No. 14471

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE QUAKER OATS COMPANY, a corporation,

Appellant,

vs.

W. E. McKIBBEN, A. B. CARTER, O. R. LEWIS and CHARLEY GEERS,

Appellees.

THE QUAKER OATS COMPANY, a corporation,

Appellant,

vs.

CHARLEY GEERS,

Appellee.

Appeals From the United States District Court for the Southern District of California, Central Division.

APPELLANT'S REPLY BRIEF.

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Errata.

1. All of page 18 of Appellant's Opening Brief should be indented and enclosed in quotation marks to show that it is all an excerpt from *Clark v. Hamilton Diamond Co.,* 209 Cal. 1, 284 Pac. 915.

2. In our citations to the Court in our Opening Brief, we neglected to include, inadvertently, the citations to the National Reporter System of the following cases, which citations are here respectfully presented:

DeBerry v. Cavalier, 113 Cal. App. 30, 297 Pac. 611;

Swan v. Smith, 102 Cal. App. 541, 283 Pac. 829;

Williams v. Braun, 14 Cal. App. 396, 112 Pac. 465;

[9th Cir., Rule 20 (2) (a)].

POINTS AND AUTHORITIES IN REPLY TO APPELLEES' BRIEF.

1. Preliminary Comment.

Appellees McKibben, Carter, and Lewis have relied entirely upon the opinion of the Trial Court and that Court's comments therein contained as controlling in the case. Every element relied on by these appellees; every authority pointed out by them, and every bit of the evidence upon which their brief is predicated, presumes that an actual payment is made for goods transferred.

That is to say; no discussion whatsoever appears in their brief upon the effect of the checks being completely dishonored. Or, in other words, nothing is urged by them to refute the proposition of law that unless the purchase price is actually paid (*i. e.,* with GOOD CHECKS or cash), the title remains in the growers and there never was an actual sale. Further, they do not refute the proposal that both under the law (*England v. Moore Equipment Co.,* 8 Fed. Supp. 532) and under the chattel mortgages [Exs. 14 and 15], when any attempted sale was made without the written consent of the plaintiff in this action, the plaintiff immediately became entitled to possession. This element was written in and recorded in the mortgages. No discussion regarding the same appears.

2. The Cases Cited by the Appellees.

On page 28 of their brief, appellees cite a list of California cases. These, but for the exception of *McIntyre v. Hauser,* 131 Cal. 11, 63 Pac. 69, are each and all cited by the Lower Court in its memorandum opinion. Discussion thereof follows in the order in which they appear in appellees' brief, on page 28 thereof.

In *Maier v. Freeman,* 112 Cal. 8, 284 Pac. 915, there was no question whatsoever involving bad checks. Plaintiff bought sheep from one Nellis for $2,898.00. He owed Nellis for the sheep. Creditors of Nellis made conflicting claims upon him and he paid the money into court. The question arose as to who was entitled to the fund, a chattel mortgagee or an attaching creditor.

In the case appears the following written agreement to Nellis whereby Nellis was definitely appointed as agent to take the sheep to California to sell them and to turn the proceeds over to the bank. The writing was as follows:

> "We hereby appoint William Nellis as agent to take six cars of sheep to California, one of which goes to San Bernardino and five to Los Angeles, he to turn over the proceeds of said sheep to us, to be applied upon his mortgage to us, which said mortgage covers said sheep. This applies to these six cars only, and extends for ten days only from this date, said sheep to be shipped in our name.
>
> ARIZONA CENTRAL BANK, Mortgagees,
> By J. H. Hoskins."

The Court held, quoting *White Mountain Bank v. West,* 46 Me. 15, 20:

> ". . . from *the time of sale* the lien of the mortgage was extinguished, and the mortgagee was left with no security but the personal promise of the mortgagor to pay the proceeds to him." (Italic ours.)

Obviously, the Court envisioned and contemplated a good sale—not one for bad checks.

McIntyre v. Hauser, 131 Cal. 11, 63 Pac. 69, is another case in which a written consent to sale existed. Brown

owned a herd of cattle; third parties held a chattel mortgage thereon; Brown sold the cattle to the defendant by written contract, to which was appended a written statement to the effect that the cattle were mortgaged to the said third parties, naming them, to secure payment of an indebtedness owing to them by Brown. It was also pleaded that the mortgagee "approved and consented to such sale to said defendant provided the money derived therefrom was paid to them, [mortgagee] which said statement was signed by them." The Court construed the last allegation as meaning or being to the effect that the mortgagees consented to the sale, provided the money derived therefrom was paid to them by Hauser, the purchaser of the cattle. Before the purchase price was paid, the plaintiff, a judgment-creditor of Brown, garnished the money in the hands of Hauser, the defendant. Hauser, regardless of the garnishment, paid the money to the mortgagees and was sued by the judgment-creditor for the amount. The Court held that no cause of action was stated. It distinguished the case of *McIntyre v. Hauser* from *Maier v. Freman,* factually, and stated:

> "There is no question in this case as to the lien of the mortgages attaching to the proceeds of the sale of the cattle."

It remarked that in *Maier v. Freeman,* the sheep had not been sold at the time the agreement between mortgagor and mortgagee was made and, in addition, in the *Maier* case the mortgagor was to receive the proceeds of the sale of the sheep. It noted that in the *McIntyre* case neither of these circumstances was present.

Ramsey v. California Packing Corp., 51 Cal. App. 517, 201 Pac. 481, in the first place, involved a *crop mortgage* as distinguished from an ordinary chattel mortgage. In

the second place, the acknowledgment of execution of the mortgage was before a person who was *one-half interested in the proceeds of the crop.* The defendants were innocent purchasers. The Court stated:

> "As to actual knowledge, it is to be said that there is no evidence showing or even remotely tending to show that they had any such knowledge of the mortgage, and if, therefore, they are to be charged with any wrong in the transaction culminating in the sale of the tomatoes and corn to them, they can only thus be bound *because there must be imputed to them the notice of the mortgage constructively imparted to them by reasons of the recordation of said mortgage as required by law.*" (Italic ours.)

The Court went on to explain that no otherwise recordable instrument can be legally recorded unless its execution is legally acknowledged by the person executing it and said:

> ". . . But it is the settled law in this state as well as in other jurisdictions 'that an acknowledgment taken before a grantee, or one standing in the position of a beneficiary under a conveyance, or other written instrument, is *void,* and does not entitle an instrument to be recorded.' (Citing many California cases.) While, as between the parties to a mortgage so acknowledged, the mortgage is in full force and of binding efficacy, the record of the instrument does not impart any notice to third persons of the mortgagee's right under it. (*Lee v. Murphy,* 119 Cal. 370 [51 Pac. 955].)" (Italics ours.)

In our present case, no question arises as the mortgages were duly and properly recorded [Exs. 14 and 15]. Hence the defendants, the appellees here, can find little comfort in the *Ramsey* case. Also, be it noted: No bad checks are there involved.

Valley Bank v. Hillside Packing Co., 91 Cal. App. 517, 267 Pac. 746, also involves a crop mortgage rather than an ordinary chattel mortgage. It contains no question of bad checks. The Court herein reviewed the development of the law of the chattel mortgage in California.

The contention of the appellant there was that the crop mortgage lost its vitality when the crop was removed from the premises. The Court observed the statutory distinction between a crop mortgage and an ordinary chattel mortgage, and cited Section 2972 of the California Civil Code, as follows:

> "The lien of a mortgage on a growing crop continues on the crop after severance, whether remaining in its original state or converted into another product, *so long as the same remains on the land of the mortgagor.*" (Italics ours.)

The Court, in construing that statute, held:

> "In the instant case the removal of the crop from the land constituted a *prima facie* extinguishment of the lien of the mortgage, . . ."

The Court thereafter in its opinion mentioned that there was actually a removal, and a consent to remove and that, therefore, the statute governed, and the removal extinguished the mortgage.

In *Reno v. A. L. Boyden Co.,* 115 Cal. App. 697, 2 P. 2d 214, the subject was some honey and wax covered by a chattel mortgage. Plaintiff was the owner of the chattel mortgage; the *mortgagor* had *sold* the subject of the chattel mortgage. The evidence was held to support a finding that a conditional consent to sell had been given, *i.e.,* consent to sell was given to mortgagor *if* the mortgagee should receive $500.00.

The mortgagor sold the honey under such consent.

Again, no question of bad checks arose whatsoever.

Kuehn v. Don Carlos, 5 Cal. App. 2d 25, 41 P. 2d 585, cited by appellees McKibben, Carter and Lewis, was a claim and delivery action based upon a chattel mortgage which gave the mortgagee the right to possession upon default of the principal obligation. The mortgaged property was an airplane. The defense set up was that the mortgagee had waived the lien of his mortgage by allowing the balance of principal and interest secured by the mortgage to be included as costs, as provided by Sections 2969 and 2970 of the California Civil Code in a Justice Court action in which the airplane was levied upon by a writ of execution; and further, that the mortgagee was estopped to claim his mortgage by an agreement he had made with the judgment-creditor whereby the latter agreed to either pay the mortgagee the balance of the mortgage indebtedness or deliver to him the airplane upon payment of the amount of his judgment plus costs of sale.

The Court, in discussing the action of the mortgagee, stated:

> ". . . Admittedly, the whole procedure was irregular. The plaintiff could have stood by or he could have filed his claim with the constable. Instead, he negotiated with the judgment-creditor for the sale of the property upon execution, and in order to have the balance of the mortgage debt included as an item of costs filed with the justice a third-party claim and a receipt for payment, although *in fact he received no money.*" (Italics ours.)

The Court held that a chattel mortgagee may waive his mortgage lien or be estopped to enforce it by conduct

inconsistent with its existence. *Maier v. Freeman,* 112 Cal. 8, 44 Pac. 357 is cited. The Court finally holds:

> ". . . The conduct of the mortgagee, as disclosed by the record in this case, was so inconsistent with the continued existence of the mortgage lien that we are forced to the conclusion that the lien was waived."

Again it is noted that there is no question of bad checks or any bad faith on the part of the *purchaser of the airplane.* The mortgagee in this case was guilty of the bad faith, an element here utterly lacking.

I. S. Chapman & Co. v. Ulery, 15 Cal. App. 2d 452, 59 P. 2d 602, is another case which deals with a *crop* mortgage, and is consequently governed under the statute pertaining thereto (Sec. 2972, Cal. Civ. Code). The mortgage in question itself provided that the mortgagor should take care of the crops and ". . . harvest, pick, gather, and box and deliver immediately into the possession of a marketing association, packing house, or other buyer such quantity as said citrus crop as will, when sold, produce enough proceeds . . . to pay off said promissory note . . ."

The Court held that where the crops were removed under this agreement that the mortgagor might pick and harvest the same without any restriction upon the matter of removal or the place of sale then such removal extinguished the lien as in Sec. 2972 Cal. Civ. Code provided The case cites *Ramsey v. California Packing Co.,* 51 Cal. App. 517, 201 Pac. 481, and in passing quotes the following:

> ". . . obviously, if the crops were removed by and with the consent of the plaintiff, then they were

> not wrongfully or tortiously removed and in that case the lien of the mortgage ceased upon such removal by operation of law. This proposition follows from the terms of Sec. 2972 of the Civil Code. . . . This agreement (allowing the mortgagors to sell the mortgaged crops and turn over the proceeds of sale to the plaintiff and Emerson) amounted in practical effect to a substitution of the personal obligation of the mortgagors for the security of the mortgage. . . ."

Again, no bad checks were involved and obviously the price was paid in real value.

3. Argument.

Counsel for appellees McKibben, Carter and Lewis concede "that the elemental rule is that a bad check tortiously given may not constitute payment." How a bad check can be other than *tortiously given* in the absence of a complete undeniable understanding that it is bad, and that it is definitely accepted for payment, we do not know. Tortious means wrongful. (Bouvier's Law Dictionary, Baldwin's Students Edition.)

The entire record is replete that Quaker knew nothing of any of these "sales" being made until after they were made, and until after the checks were in its hands. Quaker deposited the checks in the ordinary course of business.

The only conduct on Quaker's part which might be said to approach an estoppel was the custom that checks were made to Quaker and grower jointly. But these were supposed to be *good checks*. Ohlson and McVickers have not passed title according to their own testimony in that they have been debited and credited "in and out" with the proceeds of the checks; when the proceeds failed to materialize, the debit remained [R. 241].

The record is utterly destitute of any semblance of fact or evidence to sustain a finding that there was an *agreement that bad checks would be accepted,* or that the checks themselves, good or bad, were to be in lieu of cash on presentment.

As in *Clark v. Hamilton Diamond Co.,* 209 Cal. 1, 284 Pac. 915, the recipients of the checks followed the usual course of business.

Under the authorities cited here and in our Opening Brief, we respectfully submit that title never passed to the hucksters. Hence, they had no title to pass to the processors, and nothing but possession, tortiously acquired.

Appellees McKibben, Lewis and Carter have quoted in their brief from *Clark v. Hamilton Diamond Co., supra,* but have omitted from their quotation one of its most cogent parts, *i. e.,* "There was no other indicia of ownership than mere possession. *That was not enough.*" The quotation then goes on to say (App. Br. p. 32):

> "There must have been some act or conduct on the part of the real owner whereby the parties selling were clothed with apparent ownership, or authority to sell, and which the real owner will not be heard to deny or question, to the prejudice of the innocent third persons dealing on the faith of such appearances."

Here, Quaker, plaintiff-appellant, brings suit by virtue of its right of possession under the chattel mortgages. The true owners were Ohlson and McVickers. Just what conduct on the part of Ohlson and McVickers [or of Quaker] the appellees are pointing to in their brief, we do not see. Ohlson and McVickers grew the turkeys; they

"sold" them; the checks were no good; hence title never passed. It is to be observed, we respectfully submit that in *Clark v. Hamilton Diamond Co.,* 209 Cal. 1, 284 Pac. 915 the first sale from Clark to Harry Justice, as here, was made for a *bad check.* There the Court quotes the findings as follows:

> "Plaintiff sold the ring to one Harry Justice who *'fraudulently gave a worthless check in payment therefor.'"* (Italics ours.)

The final argument of the plaintiff on page 36 of its brief regarding a housewife making a purchase at a grocery store, etc. is set at rest by the merest consideration of California Civil Code Section 2955. There it is provided that no chattel mortgage of the stock in trade of a merchant can be made.

Consequently, that analogy is as *"absurdus"*, we submit, as the statement on page 30 of the brief to the effect that a *finding of fact* by a *trial court* is *"obiter dicta to the court's conclusion."*

4. Findings Are the Basic Decision.

In *Railroad Commission v. Maxey,* 281 U. S. 82, the Supreme Court said:

> "The opinion of the court was not a substitute for the required findings. A discussion of portions of the evidence and the court's reasoning in its opinion did not constitute the special and formal findings by which it is the duty of the court appropriately and specifically to determine all the issues which the case presents. This is an essential aid to the appellate court in reviewing an equity case."

In the case of *Mayo v. Lakeland Highlands Canning Co.,* 309 U. S. 310, 316, the court said as follows:

> "The observations made in the course of the opinion are not in any proper sense findings of fact upon these vital issues. Statements of fact are mingled with arguments and inferences for which we find no sufficient basis either in the affidavits or the oral testimony.
>
> "It is of the highest importance to a proper review of the action of a court in granting or refusing a preliminary injunction that there should be fair compliance with rule 52(a) of the Rules of Civil Procedure.
>
> * * * * * * * *
>
> "We reverse the decree and remand the cause to the court below with instructions that, if the motion for interlocutory injunction is pressed, the parties, if they desire it, may be afforded a further hearing and any action taken by the court shall be upon findings of fact and conclusions founded upon the evidence and in accordance with rule 52 (a) of the Rules of Civil Procedure."

The subject is also discussed in *Maher v. Hendrickson,* 188 F. 2d 700, and in discussing this, the Court holds:

> "Under Rule 52 of the Federal Rules of Procedure, 28 U. S. C. A., it is the duty of the trial court to 'find the facts specially.' The ultimate test as to the propriety of findings is whether they are sufficiently comprehensive to provide a basis for decision and supported by the evidence. *Woods v. Oak Park Chateau Corp.,* 179 F. 2d 611; *Shapiro v. Rubens,* 166 F. 2d 659; *Life Savers Corp. v. Curtis Candy Co.,* 7th Cir., 182 F. 2d 4. They should be so explicit as to give the reviewing court a clear understanding of the basis of the trial court's decision,

Skelly Oil Co. v. Holloway, 171 F. 2d 670, and to enable it to determine the ground upon which the trial court reached its conclusion. *Continental Illinois National Bank & Trust Co. v. Ehrhart,* 6th Cir., 127 F. 2d 341. *The rule is mandatory; it must be reasonably complied with. Smith v. Dental Products Co.,* 7th Cir., 168 F. 2d 516; *Dearborn National Gas Co. v. Consumers Petroleum Co.,* 7th Cir., 164 F. 2d 332." (Italics ours.)

Thus the concept that a finding is *"obiter dicta"* finds no support in the law and, as mentioned [above] by the Supreme Court, "the opinion of the Court was not a substitute for the required findings." Here, of course, we are directly attacking findings of the lower court as actually entered.

5. Discrepancies in Appellees' Brief.

Appellees make many references to various parts of the record and quote much testimony. Much of it is either out of context or fails to support in any way the findings attacked. A clear example of this is as follows:

The quotation from the testimony of Mr. Brooks is cited by the appellees on page 30 of its brief is not found where cited to the record. The quotation instead of being on transcript page 162 is actually found on page 163. It has been quoted out of context. Obviously, it is a gratuitous statement by the witness and is diametrically opposite to the written language of Exhibit 12, which was and is the basic contract between Quaker, the mortgagee, and McVickers and Ohlson, the growers of the chattels.

6. Conclusion.

In closing, we again respectfully urge that new findings of fact based upon undisputed evidence should be entered by this Court and a new and different judgment should be ordered entered by the Trial Court.

Respectfully submitted,

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